STATE OF MICHIGAN

COURT OF APPEALS

ARNOLD SODEN, DONALD TURNBULL, MARION TURNBULL, SHARLEEN CARRELL, GLADYS RICE, DONALD RICE, A. GAGNE, BARBARA BINKLEY, LARRY BINKLEY, FRED BRANT, JUDITH BRANT, FRED BRANT, MARY BRANT, JOSEPH BRANT, KENNETH ALLEN, ANN ALLEN, GERALD TORSCH, JANET TORSCH, EMILY TAYLOR, RICHARD HARTMAN, DAYNE-ANN, HELD, JAMES SCHNIERS, JUDI SCHNIERS, RALPH LEVELY, DONNA LEVELY, RICHARD DEMARIA, NANCY DEMARIA, MARLENE HINCHLIFFE, TED HOINKA, ELIZABETH SPALTENSPERGER and GEORGE SPALTENSPERGER,

Plaintiffs-Appellants,

v

LAKES OF THE NORTH ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
January 24, 2006

No. 263459
Antrim Circuit Court
LC No. 04-008070-CH

Before: Fitzgerald, P.J. and O'Connell and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's two orders of partial summary disposition. We reverse in part, affirm in part, and remand.

I. Basic Facts and Procedural Background

Lakes of the North is a residential and recreational community comprised of 8,028 lots and numerous amenities. The original developer of the community created defendant owner's association to maintain and manage the common properties, to enforce the covenants and restrictions, and to collect any applicable assessments and charges from lot owners.

Defendant sought to levy a one-time special assessment of $35 against all original lots and to increase the annual assessment fee for original lots from $125 to $160. To vote on a

special assessment or a change of the annual assessments, the covenants required a quorum of 60 percent of all voting members by proxy or in person at an initial meeting. Before a meeting could be called, voting members had to be given 30 day's notice. The covenants also allowed the board to call another meeting if that quorum was not met. The quorum requirement at any subsequent meeting would be reduced by one-half the number at the preceding meeting.

Because one vote applied to each lot, 4,816 votes would need to be represented at a meeting to initially meet quorum, which defendant believed was an "unattainable number." Ultimately, defendant decided to provide one written 30 day's notice for a series of successive meetings to be held on one day. The notice provided for an indefinite number of successive meetings to be held on September 4, 2004, beginning at 9:00 a.m. until quorum was met, noting that "[t]he number of concurrent meetings to be held will be dependent on achieving the quorum requirements of the Restrictive Covenants."

At the initial meeting on September 4, 2004, only 1,721 votes were represented. After a series of adjournments and new "meetings" were called, a final third meeting was called and the allegedly reduced quorum of 1,204 was met. The assessments sought by defendant were approved at this third meeting.

Plaintiffs filed this action challenging the use of absentee ballots, the imposition of special assessments solely on primary lots, the calling of successive meetings on one day to avoid the strict quorum requirements, the use of association funds to solicit proxies for defendant's sole position, and the special assessments for maintaining a public road. Plaintiffs moved for summary disposition under MCR 2.116(C)(9) and (10) requesting sanctions against defendant for asserting a frivolous defense, a nullification of the vote, that the special assessments and increase of annual assessments "be returned to all Association members," that an injunction be issued prohibiting defendant from further violation of the covenants, and that defendant be ordered to pay all of plaintiffs' legal fees. Defendant then submitted a cross-motion for summary disposition under MCR 2.116(C)(10).

Relevant to this appeal, the trial court ruled that the levying of special assessments solely against the original lots was invalid, but reserved judgment on the proper remedy. The trial court held that the September 4, 2004, meeting(s) complied with the quorum requirements of defendant's restrictive covenants. The trial court subsequently ordered defendant to refund to the 34 named plaintiffs all special assessments paid by plaintiffs. The trial court denied plaintiffs' motion for reconsideration.

II. Analysis

A. Restrictive Covenants

Plaintiffs first argue that the trial court erred in granting summary disposition and ruling that the meeting met the quorum requirements of the restrictive covenants. We review de novo an order granting summary disposition. *Diamond v Witherspoon*, 265 Mich App 673, 680; 696 NW2d 770 (2005). In reviewing a decision under MCR 2.116(C)(10), this Court considers all record evidence in the light most favorable to the nonmoving party to decide whether there is any genuine issue of material fact that would entitle the nonmoving party to judgment as a matter of law. *Id.* at 681-682.

Plaintiffs argue that the quorum and notice requirements require defendant to call and notice another meeting, subject to fresh notice requirements, rather than the procedure followed by defendant. We agree.

A restrictive covenant is a contract designed for the purpose of "enhancing the value of property and is a valuable property right." *Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). "Where a contract is to be construed by its terms alone [and without reference to extrinsic evidence], it is the duty of the court to interpret it." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003) (punctuation and citations omitted). "Restrictive covenants are to be read as a whole to give effect to the ascertainable intent of the drafter." *Mable, supra* at 505. If the meaning of a restrictive covenant is not clear, the court may consider the intent of the drafter. *Rofe v Robinson (On Second Remand)*, 126 Mich App 151, 157; 336 NW2d 778 (1983). "In construing restrictive covenants, giving effect to the intent of the drafter, its words should be given their ordinary meaning, avoiding an over technical analysis." *Mable, supra* at 505 (citations omitted). Finally, "courts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp, supra* at 468.

To either change the annual assessment or levy a special assessment, Article 5 of the restrictive covenants provide:

> Section 4. Special Assessments for Capital Improvements. In addition to the annual assessment authorized in Section 3 hereof, the Association may levy in any assessment year on each Original Lot sold by the Developer, its representatives or assigns, a special assessment . . . provided any such assessment have the affirmative of two-thirds (2/3) of the votes of all voting members who are voting in person or by proxy at the meeting duly called for this purpose, written notice of which shall be sent to all members at least thirty (30) days in advance and shall set forth the purpose of the meeting.
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> Section 5. Change in Basis and Maximum of Annual Assessment. Subject to the limitation of Section 3 . . . the Association may change the maximum and basis of the assessments fixed by Section 3 . . . prospectively for any annual period provided that any such change shall have the assent of two-thirds (2/3) of the votes of the members who are voting in person or by proxy at a meeting duly called for such purposes, written notice of which shall be sent to all members at least 30 days in advance setting forth the purpose of the meeting . . . .
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> Section 6 Quorum for any Action Authorized under Section 4 and 5. The Quorum required for any action authorized by Sections 4 and 5 hereof shall be as follows:
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> At the first meeting called, as provided by Sections 4 and 5 hereof, the presence at the meeting of Members or of proxies, entitled to cast sixty (60) percent of all the votes of the membership shall constitute a quorum. *If the required quorum is not forthcoming at any meeting, another meeting may be called, subject to the notice requirement as set forth in Section [sic] 4 and 5*, and the required quorum at any

> such subsequent meeting shall be one-half (1/2) of the required quorum at the preceding meeting, provided that no such subsequent meeting shall be held more than sixty (60) days following the preceding meeting. [Emphasis added.]

Section 6 specifically contemplates what steps defendant must take if a quorum is not obtained in any meeting. We agree with plaintiffs, that to call a second meeting, the plain meaning of § 6 requires that first there be, in order: (1) a failure to obtain quorum at a prior meeting; (2) written notice to voting members; (3) 30 days in advance. Thus, all three steps must occur in the sequence identified in § 6. Here, the notice of successive meetings following the first meeting on September 4, 2004, failed to meet the terms of § 6 because there had not yet been a failure to obtain a quorum at the initial meeting.

Defendant claims that the 30-day notice provisions in §§ 4-5 are met if the board gives one 30-day notice of successive meetings on the same day, with each meeting specifically called for the initial purpose of decreasing quorum. Defendant's interpretation ignores the express language of § 6, which states that another meeting may be called to reduce quorum, "subject to the notice requirement[s]."[1] Not only is defendant's interpretation strained and overly technical, *Mable, supra* at 505, it also effectively nullifies the substance of the quorum requirement. As such, it impermissibly renders the phrase "subject to the notice requirement . . . in Section 4 and 5" surplusage and nugatory. *Klapp, supra* at 468.

Accordingly, we conclude that the trial court erred in granting summary disposition to defendant.

B. Injunctive Relief

Next, plaintiffs argue that the trial court erred in refusing to issue an injunction directing defendant to refund the improperly levied assessment to nonparties. We disagree. We review a trial court's decision to grant or deny injunctive relief for an abuse of discretion. *Fritz v St. Joseph Co Drain Comm'r,* 255 Mich App 154, 157; 661 NW2d 605 (2003). Defendant contends that plaintiffs lack standing to assert the rights of non-parties. Whether a party has standing is a question of law, which we review de novo. *46th Circuit Trial Court v Crawford Co,* 266 Mich App 150, 177; 702 NW2d 588 (2005).

To the extent that plaintiffs request an order directing defendant to return funds to all lot owners, plaintiffs are impermissibly asserting the rights of third parties who did not participate in this litigation. With respect to the improper assessments levied against nonparties, plaintiffs lack any "legally protected interest that is in jeopardy." *46th Circuit Trial Court, supra* at 177; see also *Associated Builders and Contractors v Director of Consumer & Industry Services Dep't,* 472 Mich 117, 124-126; 693 NW2d 374 (2005). Even if the trial court's ruling arguably caused a non-uniform application because some association members had paid the assessment while plaintiffs had not, plaintiffs still lack standing to assert the rights of third parties. However, the

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[1] Our Supreme Court has noted that, regarding statutes, the term "subject to" means "dependant upon." *Mayor of Lansing v MPSC,* 470 Mich 154, 160-161; 680 NW2d 840 (2004).

trial court did not create any non-uniform rule, but merely adjudicated the rights of the parties before it. If actual payment of the assessment is not uniform, it is simply because plaintiffs challenged the assessment, entitling them to a refund, while others did not. We discern no abuse of discretion.

C. Sanctions

Finally, plaintiffs contend that defendant should be required to pay sanctions. We disagree. Plaintiffs fail to cite for this Court *any* authority to support the claim that they are entitled to sanctions. Thus, we are left to merely speculate on what grounds plaintiffs should be entitled to sanctions. Plaintiffs merely make the cursory assertion that the defense was frivolous without providing any explanation as to how it was frivolous. This Court need not consider a position or argument when the appellant fails to provide any authority to support it. *McCartney v Attorney General*, 231 Mich App 722, 725; 587 NW2d 824 (1998). We consider this issue abandoned.

Reversed in part, affirmed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly